

**Kevin McCulloch**

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**From:** Kevin McCulloch <kmcculloch@nelsonmcculloch.com>  
**Sent:** Friday, November 14, 2014 7:10 PM  
**To:** 'Rosenthal, Edward'; 'dnelson@nelsonmcculloch.com'  
**Cc:** 'Kadyshevich, Anna'  
**Subject:** RE: Warren v. Young-Wolff

FOR SETTLEMENT PURPOSES ONLY  
SUBJECT TO FRE 408

Ned

As we advised you yesterday, we have serious reservations about proceeding with settlement conferences with Wiley because your client does not appear to take this process seriously and has not made a good faith effort to settle this case (or any other case for that matter).

To be clear, if we do not make significant progress toward a settlement by next week, then we will advise Judge Dolinger that we no longer believe that a conference would be helpful and thus will ask him to cancel the conference so as not to waste his time.

As to your email below, your Offer of Judgment was not a settlement offer and Wiley has not yet made a settlement offer.

If you want us to treat your OJ from 12 months ago as an opening settlement offer now, that is *very disappointing* because your offer (1) fails to consider that Mr. Warren's copyrights in the relevant photo were registered by Corbis prior to any infringements by Wiley (WW-000205-208) and, as you know, the 9<sup>th</sup> Circuit recently held that such registrations are valid for the underlying photos; (2) ignores that the Second Circuit rejected your client's appeal on the statute of limitations defense in *Psihoyos* which is the same position you've taken in this case; and (3) is not based on any realistic measure of damages, actual or statutory. So, even if we were to treat your Offer of Judgment as an offer to settle, the fact that your client has not revised its settlement position in light of any discovery or these crucial rulings from the 9<sup>th</sup> and 2<sup>nd</sup> Circuit further demonstrates to us that Wiley is not interested in having good faith discussions regarding a potential settlement.

Our client has authorized us to settle the claims in suit for \$ [REDACTED] This offer shall expire on November 18 at 5pm eastern by its terms.

Given the facts in this case, we sincerely hope that Wiley makes a serious counteroffer. If not, and your client continues to make settlement offers that are under six figures for a claim related to the cover photo on a book that earned over \$ [REDACTED] in revenue, then we will know that there is no prospect of settlement and we should advise the Court that it can cancel the conference on December 2.

Regards

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**From:** Rosenthal, Edward [mailto:[erosenthal@fkks.com](mailto:erosenthal@fkks.com)]  
**Sent:** Friday, November 14, 2014 2:59 PM  
**To:** 'kmcculloch@nelsonmcculloch.com'; 'dnelson@nelsonmcculloch.com'  
**Cc:** Kadyshovich, Anna  
**Subject:** Warren v. Young-Wolff

**FOR SETTLEMENT PURPOSES ONLY**

Kevin & Dan:

We are writing in advance of the settlement conference scheduled for December 2 before Magistrate Judge Dolinger. As you know, one of the court's requirements is that the parties speak to one another about their respective settlement positions prior to the conference.

My recollection is that the last communication about settlement in this case came at the time Wiley made an Offer of Judgment in about November 2013. I do not believe that you made any counter-proposal to that offer. We do think it would help to move things along if you informed us as to Mr. Warren's settlement demand. We then can have additional conversations and communications in an effort to move this toward resolution.

We look forward to hearing back from you.

Ned

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